

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 8, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 98-204
Petitioner	:	A.C. No. 15-13936-03552
v.	:	
	:	Star Fire Mining
STAR FIRE MINING,	:	
Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of a Civil Penalty filed by the Secretary of Labor (ASecretary@) alleging a violation by Star Fire Mining (AStar Fire@) of 30 C.F.R. ' 77.1303 (pp). Pursuant to notice, the case was heard in Kingsport, Tennessee, on December 15, 1998.

Star Fire operates a surface bituminous Coal Mine in Perry County, Kentucky. As part of its operation Star Fire drills 80 foot deep blast holes that are filled with an explosive and subsequently blasted. On February 13, 1998, an unplanned explosion of a misfired drill hole occurred while Larry Ellison was operating an electrical shovel in the area, causing him to suffer a fractured skull and an injury to his right hand. Jim Thornsberry who was operating a rock truck in the area was also injured. After conducting an investigation, the Secretary issued a Citation alleging that Star Fire violated 30 C.F.R. ' 77.1303 (pp) which provides as follows: A[b]lasted areas shall be examined for undetonated explosives after each blast and undetonated explosives found shall be disposed of safely.@

The Secretary offered the testimony of two inspectors, John Dishner and Elmer Hall, Jr. Dishner testified that he conducted an investigation of the accident. He identified the *Report of Blasting Operations* (Government Exhibit 1), which sets forth that 17 holes had been blasted on February 6, 1998.

Dishner indicated, based upon his investigation, that it appeared that the explosion at issue

that occurred on February 13, 1998, resulted when the bucket of an electrical shovel operating in the area that had been blasted on February 6, struck an unfired detonation, and it exploded. Dishner admitted on cross-examination that when he examined the area in question on February 13, the terrain was not in the same condition as it had been prior to the explosion. He indicated that he did not see anything that evidenced undetonated explosive.

Hall, who was the lead accident investigator, indicated that on February 13, 1998, an anonymous telephone caller asserted that there was another failed hole in the area at issue. Hall testified that he was subsequently informed by Star Fire that an undetonated hole had been found and shot.

Hall opined that on February 6, 1998, a post blast inspection did not detect undetonated holes. He said that the area should have been undisturbed if it had not been shot. Hall testified regarding the basis for his opinion as follows: A [i]f a quality inspection had been done, that since there should have been a blast for an experienced blaster to observe and figure that there was something wrong with this shot (sic) (Tr. 88). He said he also based his opinion upon his 30 years experience in both underground and surface coal mines, and 3 years experience as an investigator.

Hall said that he spoke with Daniel Brock, a Star Fire employee who was in charge of the blasters, Tom Singleton, Star Fire's Superintendent, and Kyle Biares, who all assured him that a post blasting inspection had been done. However, Hall did not examine any records.

On cross-examination, Hall conceded that prior to the instant investigation, he had investigated blasting accidents, but had never investigated a misfire. He indicated that he had been told that after the accident at issue, Star Fire had to cut down 20 to 25 feet below the surface before another undetonated blasting line was found. Hall was not present when this unblasted hole was discovered. He conceded that at the time of his inspection on February 13, 1998, he did not see any evidence of a second unblasted hole; that he did not talk to the Star Fire employee who had made the post blasting examination; that all blasting lines that he found on the surface had been detonated; that a post blast examiner would not have been able to see the condition of lines in the blasting hole; that he did not know the kind of examination conducted after the initial blast; that he did not know what the surface that had been blasted looked like; and that he did not know if there was any evidence of undetonated holes when the examination was made. After the Secretary presented the testimony of Dishner and Hall, and introduced seven exhibits, the Secretary rested.

At the conclusion of the Secretary's case, Star Fire made a motion to dismiss. After listening to argument from counsel for both parties on the motion to dismiss, the motion was granted. The bench decision granting the motion is set forth below with minor changes not relating to matters of substance.

The standard at issue, 30 C.F.R. ' 77.1303 (pp) requires that blasted areas shall be examined for undetonated explosives after each blast and undetonated explosives found shall be

disposed of safely. The Secretary has the burden of proving by credible evidence that there had not been an examination, or that an examination had been performed but such an examination was not adequate.

I find the Secretary has not presented a prima facie case in this matter. There is no evidence that has been presented as to the type of examination that was performed. There is no evidence as to how the surface appeared at the time of the examination. There is no specific evidence as to what the examiner did. There is no evidence as to what a reasonable examination should have entailed. There is no evidence relating to the appearance of the ground surface at the time of the examination.

Counsel for the Secretary indicated that she was not able to ascertain any authority that stands for the proposition that the mere fact that there subsequently is found undetonated explosives raises a presumption that an area was not examined, or it was not examined properly. I have not been able to locate such authority.

So for these reasons, I find that the Secretary has not established a prima facie case, and the motion to dismiss is **GRANTED**.

ORDER

It is ordered that this case be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

Distribution:

MaryBeth Bernui, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410 (Certified Mail)

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